as a result of authorized access to such information. Such persons have a duty to protect classified information has no right to disclose that particular information to persons not authorized to receive it, persons, even if he or she should later become a journalist. By the same token, however, the statute is not intended to lead to investigation or prosecution of journalists who previously had authorized access to classified information and later, in their capacity as journalist, receive leaked information.

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THE COUNTERINTELLIGENCE REFORM ACT OF 2000

Mr. SPECTER. Mr. President, I have sought recognition to discuss legislation arising from the investigation by the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, which has been conducting oversight on the way the Department of Justice and the Federal Bureau of Investigation have responded to allegations of espionage in the Department of Defense and the Department of Energy. This bipartisan proposal will improve the counterintelligence procedures used to detect and defeat efforts by foreign governments to gain unlawful access to our top national security information by improving the way that allegations of espionage are investigated and, where appropriate, prosecuted.

Together with Senators TORRICELLI, GRASSLEY, THURMOND, SESSIONS, SCHUMER, FEINGOLD, BIDEN, HELMS and LEAHY, I introduced the Counterintelligence Reform Act on February 24 of this year. The Judiciary Committee unanimously reported the bill on May 18, and it was referred to the Senate Select Committee on Intelligence which also deals with espionage matters.

The Senate Intelligence Committee unanimously reported the bill on July 20, and has included the measure as an amendment to the Intelligence Authorization bill which passed the Senate today.

Few tasks are more important than protecting our national security, so building and maintaining bipartisan support for this legislation to correct the problems we identified during the course of our oversight was my top priority. The reforms contained in this legislation will ensure that the problems we found are fixed, and that the national security is better protected in the future.

To understand why this legislation is necessary, I would like to review two of the cases that the subcommittee looked at—the Wen Ho Lee case and the Peter Lee case. Former Los Alamos scientist Dr. Wen Ho Lee was arrested on December 10, 1999, and charged with 59 counts of violating the Atomic Energy Act of 1954 and unlawful gathering and retention of national defense information. In a stunning reversal on September 13, the government accepted a deal in which Dr. Lee would plead guilty to one count of unlawfully retaining national defense information and would be sentenced to time served, in exchange for telling what he had done with the tapes. There remains a question as to whether Department of Justice officials tried to make up for their blunders in this case by throwing the book at Dr. Lee. The Judiciary Subcommittee on Department of Justice Oversight will continue to hold hearings on this matter, but it has been clear from the beginning that the Department of Justice bungled the investigation of Dr. Lee.

The critical turning point in this case came on August 12, 1997, when the Department of Justice's Office of Intelligence Policy and Review (OIPR) turned down an FBI application for an electronic surveillance warrant under the Foreign Intelligence Surveillance Act, or FISA. OIPR believed that the application was deficient because it did not show sufficient probable cause, and therefore decided not to let the application go forward to the special FISA court.

In making this determination, the DoJ made several key errors. The Department of Justice used an unreasonably high standard for determining probable cause, a standard that is inconsistent with Supreme Court rulings on this issue. For example, one of the concerns raised by OIPR attorney Allan Kornblum was that the FBI had not shown that the Lees were the ones who passed the W–88 information to the PRC, to the exclusion of all the other possible suspects identified by the DoE Administrative Inquiry. That is the standard for establishing guilt at a trial, not for establishing probable cause to issue a search warrant.

DoJ was also wrong when Mr. Kornblum concluded that there was not enough to show that the Lees were ''presently engaged in clandestine intelligence activities.'' The information provided by the FBI made it clear that Dr. Lee's relevant activities continued from the 1980s to 1992, 1994 and 1997, yet that was deemed to be too stale, and the DoJ refused to send the FBI's surveillance request to the FISA court.

When FBI Assistant Director John Lewis raised the FISA problem with the Attorney General on August 20, 1997, she delegated a review of the matter to Mr. Dan Seikaly, who had virtually no experience in FISA issues. It is not surprising then, that Mr. Seikaly again applied the wrong standard for probable cause. He used the criminal standard, which requires that the facility in question be used in the commission of an offense, and with which he was more familiar, rather than the relevant FISA standard which simply requires that the facility ''is being used, or is about to be used, by a foreign power or an agent of a foreign power.''

The importance of DoJ's erroneous interpretation of the law as it applied to probable cause in this case should not be underestimated. Had the warrant been issued, and had the FBI been permitted to conduct electronic surveillance on Dr. Lee, the Government would probably not be in the position—as it is now—of trying to ascertain what really happened to the information that Dr. Lee downloaded. There should be no doubt that transferring classified information to an unclassified computer system and making unauthorized tape copies of that information—seven of which contain highly classified information and remain unaccounted for—created a substantial opportunity for foreign intelligence services to access our most important nuclear secrets.

The FISA warrant could have and should have been issued at several points, some before and some after it was rejected in 1997. Each key event where the FISA warrant was not requested and issued represents another lost opportunity to protect the national security. For example, Dr. Lee was identified by the Department of Energy's Network Anomaly Detection and Intrusion Recording system (NADIR) in 1993 for having downloaded a huge volume of files.

As the name of the system implies, it is designed to detect unusual computer activity and look out for possible intruders into the computer. Individuals who monitored the lab's computers knew that Dr. Lee's activities had generated a report from the NADIR system, but didn't do anything about it. They didn't even talk to him. An opportunity to correct a problem, to protect national security, just slipped away.

In 1994, Lee's massive downloading would have again showed up on NADIR, but DoE security people never took action. Now, we're told, they can't even find records of what happened. Yet another missed opportunity to protect the national security by looking into what was going on.

When Wen Ho Lee took a polygraph in December 1998, DoE misrepresented the results of this test to the FBI. DoE told the FBI that Dr. Lee passed this polygraph when, in fact, he had failed. This error sent the FBI off the trail for two months.

When Wen Ho Lee failed a polygraph on February 10, 1999, the FISA warrant should have been immediately requested and granted. It wasn't.

The need for legislation to address these problems is obvious. The unclassified information on this case shows clearly that it was mishandled. The classified files make that point even more clear. Last year the Attorney General asked an Assistant U.S. Attorney with substantial experience in prosecuting espionage cases to review the Wen Ho Lee matter. That prosecutor, Mr. Randy Bellows, conducted a thorough review of the case and confirmed all of our major findings: the case was badly mishandled, the FISA request should have gone forward to the court. The list goes on. Our counter-intelligence system failed in this case, and the information at risk

is too important to let this dismal state of affairs continue.

The Counterintelligence Reform Act of 2000 will help to ensure that future investigations are conducted in a more thorough and effective manner. Among the key provisions in this legislation is one that amends the Foreign Intelligence Surveillance Act, FISA, by requiring that, upon the request of the Director of the FBI, the Secretary of State, the Secretary of Defense or the Director of Central Intelligence, the Attorney General shall personally review a FISA application. If the Attorney General decides not to forward the application to the FISA court, that decision must be communicated in writing to the requesting official, with recommendations for improving the showing of probable cause, or whatever defect OIPR is concerned with.

Under this legislation, when a senior official who is authorized to make FISA requests goes to the Attorney General for a personal review, that senior official must personally supervise the implementation of the recommendations. This provision will ensure that when the national security is at stake, and where there is a serious disagreement over how to proceed, the Attorney General and other senior officials are the ones who work together to resolve disputes, and that the matter is not delegated to attorneys who have never worked with FISA before.

The Counterintelligence Reform Act also addresses the matter of whether an individual is ''presently engaged'' in a particular activity to ensure that genuine acts of espionage which are belatedly discovered are not improperly eliminated from consideration. As FISA is currently worded, it is possible for someone like Mr. Kornblum to conclude that actions as recent as a couple of years ago or even a few months are too stale to contribute to a finding of probable cause. Although I do not agree with Mr. Kornblum's interpretation of the law, I am confident that the changes contained in the Counterintelligence Reform Act will make it clear that activities within a reasonable period of time can be considered in determining probable cause.

The investigation of Dr. Lee was also mishandled in the field, where the FBI and the Department of Energy often failed to communicate. For example, after OIPR rejected the FBI's 1997 FISA application, the FBI told the Department of Energy that there was no longer an investigative reason to leave Dr. Lee in place, and that the DoE should do whatever was necessary to protect the national security. Unfortunately, no action was taken by DoE until December 1998, some 14 months after the FBI had said it was no longer necessary to have him in place for investigative reasons.

To address this problem, and to ensure that there is no misunderstanding about when the subject of an espionage investigation should be removed from classified access, the Counterintelligence Reform Act requires that decisions of this nature be communicated in writing. The bill requires the Director of the FBI to submit to the head of the department or agency concerned a written assessment of the potential impact of the actions of the department or agency on a counterintelligence investigation. The head of the affected agency will be required to respond in writing to the recommendation of the FBI. This requirement with ensure that what happened in the Wen Ho Lee case—where the FBI said he could be removed from access but the Energy Department didn't pull his clearance for another 14 months—won't happen again.

To avoid the kind of problems that happened when the DoE ordered a Wackenhut polygraph in December 1998, this legislation prohibits agencies from interfering in FBI espionage investigations.

The provisions of this bill will make an important contribution to improving the way counter-intelligence investigations are conducted. The subcommittee's investigation of the Wen Ho Lee case has made it abundantly clear that improvements in these procedures are necessary, and the reforms outlined in this legislation are specifically tailored to provide real solutions to real problems.

The subcommittee also looked at the espionage case of Dr. Peter Lee, who pleaded guilty in 1997 to passing classified nuclear secrets to the Chinese in 1985. According to a 17 February 1998 ''Impact Statement'' prepared by experts from the Department of Energy,

> The ICF data provided by Dr. [Peter] Lee was of significant material assistance to the PRC in their nuclear weapons development program. . . . For that reason, this analysis indicates that Dr. Lee's activities have directly enhanced the PRC nuclear weapons program to the detriment of U.S. national security.

Dr. Peter Lee also confessed to giving the Chinese classified anti-submarine warfare information on two occasions in 1997. Under the terms of the plea agreement the Department of Justice offered to Peter Lee, however, he got no jail time. He served one year in a half-way house, did 3,000 hours of community service and paid a $20,000 fine. Considering the magnitude of his offenses and his failure to comply with the terms of the plea agreement—which required his complete cooperation—the interests of the United States were not served by this outcome.

The subcommittee's review of the Peter Lee case led to the inevitable conclusion that better coordination between the Department of Justice, the investigating agency—which is normally the FBI—and the victim agency is necessary to ensure that the process works to protect the national security. One of the problems we saw in this case was the reluctance of the Department of the Navy to support the prosecution of Dr. Peter Lee. A Navy official, Mr. John Schuster, produced a memo that seriously undermined the Department of Justice's efforts to prosecute the case. This memorandum was based on incomplete information and did not reflect the full scope of what Dr. Peter Lee confessed to having revealed. As a consequence of the breakdown of communications between the Navy and the prosecution team, the 1997 revelations were not included as part of the plea agreement.

This legislation contains a provision that will ensure better coordination in espionage cases by requiring the Department of Justice to conduct briefings so that the affected agency will understand what is happening with the case, and will understand how the Classified Information Procedures Act, or CIPA, can be used to protect classified information even while carrying out a prosecution. In these briefings Department of Justice lawyers will be required to explain the right of the government to make in camera presentations to the judge and to make interlocutory appeals of the judge's rulings. These procedures are unique to CIPA, and the affected agency needs to understand that taking the case to trial won't necessarily mean revealing classified information. The Navy's position, as stated in the Schuster memo, that ''bringing attention to our sensitivity concerning this subject in a public forum could cause more damage to the national security that the original disclosure,'' was simply wrong. It was based on incomplete information and a misunderstanding of how the case could have been taken to trial without endangering national security. The provisions of this legislation which require the Department of Justice to keep the victim agency fully and currently informed of the status of the prosecution, and to explain how CIPA can be used to take espionage cases to trial without damaging the national security, will ensure that the mistakes of the Peter Lee case are not repeated.

I appreciate the efforts of my colleagues on the Judiciary Committee and the Senate Select Committee on Intelligence who have worked with me and the cosponsors of this bill. I am confident that the reforms we are about to pass will significantly improve the way espionage cases are investigated and, if necessary, prosecuted.

I yield the floor.

SECTION 305

Mr. BIDEN. Section 305 of S. 32507, the Intelligence Authorization bill, provides, in brief, that no future ''Federal law . . . that implements a treaty or other international agreement shall be construed as making unlawful an otherwise lawful and authorized intelligence activity of the United States Government . . . unless such Federal law specifically addresses such intelligence activity.'' This provision is necessary, the Committee report explains, because ''[t]here has been a concern that future legislation implementing international agreements

could be interpreted, absent the enactment of section 305, as restricting intelligence activities that are otherwise entirely consistent with U.S. law and policy.'' The concern arises from an opinion issued in 1994 by the Office of Legal Council (OLC) of the Department of Justice. In that opinion, the Office interpreted the Aircraft Sabotage Act of 1984—a law implementing an international treaty on civil aviation safety—as applying to government personnel. Although the OLC opinion emphasized that its conclusions should ''not be exaggerated'' and also warned that its opinion ''should not be understood to mean that other domestic criminal statutes apply to U[nited S[tates] G[overnment] personnel acting officially,'' the Central Intelligence Agency, out of an abundance of caution, wants to avoid cases in which legislation implementing a treaty might criminalize an authorized intelligence activity even though Congress did not so expressly provide. I understand the Agency's concern that clarity for its agents is important. At the same time, however, we should take care to specify how section 305 is intended to work.

One question is this: how do we tell when a Federal law actually ''implements a treaty or other international agreement?'' My working assumption, in supporting section 305, is that we will be able to tell whether a future law ''implements a treaty or other international agreement'' by reading the law and the committee reports that accompany its passage. If the text of that future law or of the committee reports accompanying that bill states that the statute is intended to implement a treaty or other international agreement, then section 305 is pertinent to that statute. If there is no mention of such intent in that future law or in its accompanying reports, however, then we may safely infer that section 305 does not apply. Is that the understanding of the Select Committee on Intelligence, as well?

Mr. SHELBY. That is certainly our intent. If a future law is to qualify under section 305 of this bill, we would expect its status as implementing legislation to be stated in the law, or some other contemporaneous legislative history.

Mr. BIDEN. another question is how to tell that a U.S. intelligence activity ''is authorized by an appropriate official of the United States Government, acting within the scope of the official duties of that official and in compliance with Federal law and any applicable Presidential directive.'' I am concerned that this could be misinterpreted to mean that some intelligence bureaucrat could authorize some otherwise illegal activity with a wink and a nod. It is not the intent of the Select Committee on Intelligence that there be written authorization for a U.S. intelligence activity?

Mr. SHELBY. I understand the concerns of the Senator from Delaware. We expect that in almost all cases intelligence operations exempted from future treaty-implementing legislation will have been authorized in writing. I would note however, that many individual actions might be authorized through general written policies, rather than case-specific authorizations.

Neither would I rule oral authorization in exigent circumstances. The Committee believes that intelligence agencies would be well advised to make written records of such authorizations, so as to guard against lax management or later assertions that unrecorded authorization was given for a person's otherwise unlawful actions. Such written records will also protect the government employees from allegations that their actions were not authorized.

Mr. BIDEN. My final question to the chairman of the Select Committee on Intelligence relates to how other countries may view section 305. I interpret section 305 as governing only the interpretation of a certain set of U.S. criminal laws enacted in the future and whether those laws apply to government officials. Is that also the understanding of the chairman of the Select Committee on Intelligence?

Mr. SHELBY. Yes, it is. Section 305 deals solely with the application of U.S. law to U.S. Intelligence activities. It does not address the question of the lawfulness of such activities under the laws of foreign countries, and it is in no respect meant to suggest that a person violating the laws of the United States may claim the purported authorization of a foreign government to carry out those activities as justification or as a defense in a prosecution for violation of U.S. laws.

Mr. BIDEN. I thank the distinguished chairman.

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SUBMITTING CHANGES TO THE BUDGETARY AGGREGATES AND APPROPRIATIONS COMMITTEE ALLOCATION

Mr. DOMENICI. Mr. President, section 314 of the Congressional Budget Act, as amended, requires the Chairman of the Senate Budget Committee to adjust the appropriate budgetary aggregates and the allocation for the Appropriations Committee to reflect amounts provided for emergency requirements.

I hereby submit revisions to the 2001 Senate Appropriations Committee allocations, pursuant to section 302 of the Congressional Budget Act, in the following amounts:

	Budget authority	Outlays
Current Allocation:		
General purpose discretionary	$600,351,000,000	$592,809,000,000
Highways		26,920,000,000
Mass transit		4,639,000,000
Mandatory	327,787,000,000	310,215,000,000
Total	928,138,000,000	934,583,000,000
Adjustments:		
General purpose discretionary	+1,956,000,000	+905,000,000
Highways		
Mass transit		
Mandatory		
Total	+1,956,000,000	+905,000,000
Revised Allocation:		
General purpose discretionary	602,307,000,000	593,714,000,000
Highways		26,920,000,000
Mass transit		4,639,000,000
Mandatory	327,787,000,000	310,215,000,000
Total	930,094,000,000	935,488,000,000

I hereby submit revisions to the 2001 budget aggregates, pursuant to section 311 of the Congressional Budget Act, in the following amounts:

	Budget authority	Outlays	Surplus
Current Allocation: Budget Resolution	$1,526,456,000,000	$1,491,530,000,000	$11,670,000,000
Adjustments: Emergencies	+1,956,000,000	+905,000,000	−905,000,000
Revised Allocation: Budget Resolution	1,528,412,000,000	1,492,435,000,000	10,765,000,000

THE ELECTION OF VINCENTE FOX

Mr. LEAHY. Mr. President, on July 2, 2000, the people of Mexico elected Vincente Fox, candidate of the National Action Party, to be their President. This election represents a dramatic change and a historic affirmation of democracy in Mexico. The inauguration of Mr. Fox later this year will end 71 years of PRI control of the Mexican Presidency.